Messrs Choong & Co (suing as a firm) & Ors v Advocates & Solicitors' Disciplinary Board & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R1–17–86 OF 2003
RAUS J
14 NOVEMBER 2003

Legal Profession — Professional discipline — Public complaint — Disciplinary proceedings — Complaints before Disciplinary Committee and Disciplinary Board — Delay in constituting Investigating Tribunal — Whether Disciplinary Committee and Disciplinary Board allowed to proceed with disciplinary proceedings — Grant of interim injunction to prevent Disciplinary Board from hearing disciplinary proceedings — Legal Profession Act 1976 ss 94, 95, 99, 100(1), 101, 102(2), 103B

On 12 November 1997, the Bar Council Malaysia ('the Council') lodged a complaint to the Advocates and Solicitors Disciplinary Board ('the Disciplinary Board') under s 99 of the Legal Profession Act 1976 ('the Act') against the plaintiffs. The Council alleged that the plaintiffs had breached the no-discount rule under the Solicitor's Remuneration Order ('the Order'). On 24 March 1998, the Disciplinary Board asked the plaintiffs for an explanation, which was given by the plaintiffs on 2 April 1998. On 25 July 2002, the plaintiffs were informed that the Disciplinary Board had appointed an Investigating Tribunal ('the Tribunal') and on the same day, the Tribunal wrote to the plaintiffs enquiring if they had any explanation to the said complaint. The plaintiffs contended that the delay in appointing the Tribunal had rendered it void and illegal. The Tribunal then fixed a hearing on 8 October 2002, whereby the plaintiffs declined to attend. On 9 October, the Tribunal requested further information from the plaintiffs, which was furnished on 18 October 2002. The Tribunal made a recommendation for the appointment of an Advocates and Solicitor's Disciplinary Committee ('the Disciplinary Committee'), to make a formal investigation against the plaintiffs in which the plaintiffs were notified of on 22 July 2003. Following by a letter dated 5 August 2003, the plaintiffs were notified that the complaint was fixed for hearing on 26 August 2003. The plaintiffs filed an application on 12 August 2003 seeking the High Court to restrain the Disciplinary Committee from hearing the complaint which was fixed on 26 August 2003.

Held, dismissing the application with costs:

(1) The plaintiffs should first exhaust their domestic remedies. Their arguments as to the validity of the complaint should be raised before the Disciplinary Committee at the hearing of the complaint. They also have the right to appeal to the High Court and a further right to appeal to the Federal Court (para 18).

(2) The Disciplinary Committee and the Disciplinary Board should be allowed to proceed with the disciplinary proceedings against the plaintiffs (para 19).

[**Bahasa Malaysia summary**

Pada 12 November 1997, Majlis Peguam, Malaysia ('Majlis itu') telah memfailkan satu aduan kepada Lembaga Disiplin Peguambela dan Peguamcara ('Lembaga Disiplin') di bawah s 99 Akta Profession Undang-Undang 1976 ('Akta itu') terhadap plaintif-plaintif. Majlis itu telah menyatakan bahawa plaintif telah melanggar peraturan tiada potongan harga di bawah 'Solicitors remuneraton order' ('Perintah itu'). Pada 24 Mac 1998, Lembaga Disiplin meminta plaintif-plaintif untuk alasan yang telah diberi oleh plantif-plaintif pada 2 April 1998. Pada 25 Julai 2002, plaintif-plaintif telah diberitahu bahawa Lembaga Disiplin telah melantik Tribunal Penyiasat ('Tribunal itu') dan pada hari yang sama, Tribunal itu telah menulis kepada plaintif-plaintif dan meminta sama ada plaintif-plaintif mempunyai alasan kepada aduan itu. Plaintif-plaintif menyatakan bahawa kelewatan di dalam melantik Tribunal itu telah menjadikannya tidak sah dan salah di sisi undang-undang. Tribunal itu telah menetapkan pendengaran pada 8 Oktober 2002 yang plaintif-plaintif enggan hadir. Pada 9 Oktober, Tribunal itu memohon maklumat lanjut daripada plaintif-plaintif, yang telah diberikan pada 18 Oktober 2002. Tribunal itu membuat cadangan untuk melantik Jawatankuasa Disiplin Peguambela dan Peguamcara ('Jawatankuasa Disiplin itu'), untuk menjalankan penyiasatan formal terhadap plaintif-plaintif di mana plaintif-plaintif telah diberitahu pada 22 Julai 2003. Melalui surat bertarikh 5 Ogos 2003, plaintif-plaintif diberitahu bahawa aduan itu ditetapkan untuk didengar pada 26 Ogos 2003. Plaintif-plaintif telah memfailkan permohonan pada 12 Ogos 2003 memohon kepada Mahkamah Tinggi untuk menghalang Jawatankuasa Disiplin daripada mendengar aduan itu yang ditetapkan pada 26 Ogos 2003.

Diputuskan, menolak permohonan dengan kos:

(1) Plaintif-plaintif sepatutnya menggunakan remedi-remedi dalam negeri. Hujah-hujah mereka mengenai keesahan aduan sepatut dibangkitkan di hadapan Jawatankuasa Disiplin semasa pendengaran aduan. Mereka juga mempunyai hak untuk merayu ke Mahkamah Tinggi dan merayu selanjutnya ke Mahkamah Persekutuan (perenggan 18).

(2) Jawatankuasa Disiplin dan Lembaga Disiplin patut dibenarkan terus dengan prosiding disiplin terhadap plaintif-plaintif (lihat perenggan 19).

Notes

For cases on public complaints, see 9 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1815–1816.

Cases referred to

Cheah Foong Chiew v Lembaga Jurutera Malaysia [1999] 3 MLJ 110 (refd)

Keow Seng & Company v Trustees of Leong San Tong Khoo Kongsi (Penang) Registered [1983] 2 MLJ 103 (folld)

Legislation referred to

Legal Profession Act 1976 ss 94, 95, 99, 100(1), 101, 102(2), 103B
Legal Profession (Amendment) Act 1992 (Act A812)

M Segaram (M Segaram & Co) for the plaintiffs.
Nithin V Nadakarni (Lee Hishamuddin) for the first and second defendants.
Satish Nair (Satish Nair & Assoc) for the third defendant.

Raus J:

[1] This is an application by way of originating summons by the plaintiffs for the following orders:

1 A declaration be and is hereby given that the complaint by the Bar Council Malaysia dated 12 November 1997 against the plaintiffs is null and void and of no effect.

2 The whole of the disciplinary proceedings instituted by the first defendant against the plaintiffs in respect of the complaint by the Bar Council of Malaysia dated 12 November 1997 is illegal, null and void.

3(a) The appointment of the Investigation Tribunal by the first defendant does not comply with s 100(1) of the Legal Profession Act 1976 (as amended).

(b) The appointment of the Investigation Tribunal by the first defendant is and/or was therefore, incurably illegal, void and of no effect.

(c) The appointment of the second defendant by the first defendant under ss 102(2) and 103B of the Legal Profession Act 1976 (as amended) is and/or was therefore, incurably illegal, void and of no effect.

4(a) An interim injunction be and is hereby granted to restrain the first defendant from hearing disciplinary proceedings against the plaintiffs in respect of the complaint dated 12 November 1997 pending the outcome of the plaintiffs' originating summons against the defendants.

(b) Further and/or in the alternative, that all such further disciplinary proceedings against the plaintiffs be stayed pending the outcome of the plaintiffs' originating summons.

5 The costs of this action be paid by the defendants to the plaintiffs.

6 Any further or consequential order relief or direction this honorable court may deem fit.

[2] The brief facts leading to this application are as follows.

[3] On 12 November 1997, the Bar Council Malaysia, (Bar Council) pursuant to s 99 of the Legal Profession Act 1976 ('the Act'), made a complaint to the Advocates & Solicitors Disciplinary Board ('the disciplinary board') against the plaintiffs. The complaint was for an alleged breach of the no-discount rule under the Solicitor's Remuneration Order. On 24 March 1998, the

disciplinary board asked the plaintiff for an explanation, which was given by the plaintiffs on 2 April 1998.

[4] On 25 July 2002, the plaintiffs were informed that the disciplinary board had appointed an investigating tribunal. On the same day, the investigating tribunal wrote to the plaintiffs enquiring if they had any explanation to the said complaint. The plaintiffs took the position that the delay in appointing the investigating tribunal had rendered it void and illegal. They further confirmed that they would stand by the letter of explanation that had already been given to the disciplinary board.

[5] The investigating tribunal then fixed a hearing on 8 October 2002, whereby the plaintiffs declined to attend. On 9 October 2002, the investigating tribunal requested further information from the plaintiffs, which was furnished on 18 October 2002. The investigating tribunal in its report made a recommendation for the appointment of Advocates and Solicitor's Disciplinary Committee ('the disciplinary committee'), to make a formal investigation against the plaintiffs in which the plaintiffs had been notified of on 22 July 2003. Following by a letter of 5 August 2003, the plaintiffs were notified by the disciplinary committee that the complaint was fixed for hearing on 26 August 2003.

[6] The plaintiffs filed this application on 12 August 2003, which in effect is seeking this court to restrain the disciplinary committee from hearing the complaint which was fixed on 26 August 2003 on the grounds as stated in the application.

[7] In order to understand the factual background of this case, I think it is pertinent to state the scheme of disciplinary proceedings under the Act. As stated in the affidavit filed on behalf of the first and second defendants, historically, the discipline of the legal profession was a matter for the Bar Council and the State Bar Committee. However, because of the increasing public concerns of the disciplinary legislation which weighted too heavily in favor of lawyers, the Bar Council has set up a committee chaired by the former Prime Minister, Tun Hussein Onn, to investigate the disciplinary process. Subsequently, a report was forwarded to the Attorney-General's Chamber. The Government considered the matter and amended the legislation by the Legal Profession (Amendment) Act 1992 (Act A812) which came into force on 1 April 1992, by creating the disciplinary board in an attempt to balance with the public interest in having a disciplined and ethical profession. The composition of the disciplinary board is made up as follows:

(a) the Chairman, who is appointed by the Chief Judge of the High Court of Malaya;

(b) the President of Bar Council with the Vice President as the alternative;

(c) 15 senior members of the Bar, none of whom is less than 15 years standing, all of whom are appointed by the Chief Judge of the High Court.

[8] Section 95 of the Act established a disciplinary committee and investigating tribunal. Section 101 of the Act then provides that when a written complaint

A is referred to the disciplinary board, the disciplinary board shall, if it considers that there is merit in the complaint forthwith constitute an investigating tribunal. After its appointment, the investigating tribunal is required to forward a copy of the complaint to the advocates and solicitors concerned if the disciplinary board has not done so. The advocates and solicitors concerned have the right to give a written reply, and the right to be heard. The investigating B tribunal will then consider the matter and prepare a report to the disciplinary board. The investigating tribunal in its report may recommend that:

(i) a formal investigation is not necessary;

(ii) no cause of sufficient gravity exists for formal investigation but the advocates and solicitors concerned should be ordered to pay a penalty. C Before the Board imposes any penalty, it will invite the advocates and solicitors concerned to address it.

(iii) there should be a formal investigation by a disciplinary committee.

[9] If, after considering the investigating tribunal's report, the disciplinary D board determines that there should be a formal investigation, the disciplinary board will appoint a disciplinary committee. The advocate and solicitors concerned now have a second opportunity to make all their submissions and raise all of their arguments on whether there is any merit in the complaint. After the hearing and investigating, the disciplinary committee will consider the complaint and make its recommendation to the disciplinary board, who E will then consider the matter and make an order in respect of the complaints. If the advocates and solicitors concerned are not satisfied with the disciplinary board's order, they have the right to appeal to the High Court within one month after being notified of the order. The appeal will then be heard by a panel of three High Court judges. The advocate and solicitor has a further right to appeal to the Federal Court, within one month of the F decision of the High Court.

[10] It is the plaintiff's submission that the whole of the disciplinary proceedings instituted by the Disciplinary Board against the plaintiffs in respect of the complaint by the Bar Council dated 12 March 1997 is illegal, null and void. The trust of the plaintiffs' submission is twofold. Firstly, the G written complaint by the Bar Council dated 12 January 1997 was against 'Senior Partners of Chong & Co, BS Sidhu & Co and Azizuddin Kwong & Co'. Thus, according to the plaintiffs the whole complaint is *void ab initio* and contrary to the Advocates and Solicitors Rules, made under the Act 1976, because the complaint by the Bar Council was against the partners of these firms. According to the plaintiffs under s 94 of the Act, disciplinary H proceeding may only be taken against an 'advocate and solicitor'.

[11] Secondly, it is the submission of the plaintiffs that there has been inordinate delay on the part of the disciplinary board in constituting the investigating tribunal. According to the plaintiffs, the constitution of the investigating tribunal after a lapse of more than four years and eight months I since the complaint was not in compliance with s 100(1) of the Act which requires that 'the disciplinary board shall, if it considers that there is merit in the application or complaint, forthwith constitute an Investigation Tribunal'.

According to the plaintiffs, the inordinate delay has caused much prejudice to the plaintiffs as the senior partners of Messrs Choong & Co, Messrs Azizuddin Kwong & Co and Messrs BS Sidhu. They are very senior members of the Bar and their integrity has been compromised and their reputation damaged by having the complaint dated 12 March 1997 hanging over their heads for four years and eight months.

[12] For the aforesaid reasons, the plaintiffs concluded that in the interest of justice and in order to prevent the originating summons filed herein from being rendered nugatory, an interim injunction ought to be granted to prevent the disciplinary board from hearing disciplinary proceedings against the plaintiffs, in respect of the complaint dated 12 November 1997 pending the outcome of the originating summons filed by the plaintiffs. According to the plaintiffs, this was an appropriate case for the grant of injunction and or a stay of further proceeding by the disciplinary board and the disciplinary committee because there are special circumstances in view of the facts of this case.

[13] The defendants in reply, submitted that making a complaint against a partnership is the same as making it against all the partners individually. According to the defendants, any other decision would disadvantage lay clients, who make complaints against firms. It was submitted that unlike a company, a partnership has no separate identity from its individual partners. A suit against a partnership is a suit against all partners, just as all their names were set out individually. The Federal Court case of *Keow Seng & Company v Trustees of Leong San Tong Khoo Kongsi (Penang) Registered* [1983] 2 MLJ 103 was cited to support the said argument.

[14] With regard to the second issue, it was not denied by the defendants that there was a delay in processing the complaint against the plaintiff. But according to the defendants, the delay in itself cannot invalidate a complaint. According to the defendants, the word 'forthwith', does not mean immediately. In any event, according to the defendants, the delay has not prejudiced the plaintiffs. This is because, the proceedings of the first defendant are private, and there is no publicity given to them.

[15] With regard to the plaintiff's application for an interim injunction, the defendants submitted that the balance of convenience does not lie in favor of granting any injunction. According to the defendants, the complaints raised by the plaintiffs can be raised in the disciplinary proceeding.

[16] The defendants also raised a noble point, that is whether this court should entertain this action. This is because according to the defendants, the Act provides a domestic remedy for the plaintiffs. Thus, the plaintiffs must exhaust their domestic statutory remedies before coming to this court.

[17] I am of the view in an application of this nature, that the court must consider not only the interests of the advocates and solicitors, but also that of the legal profession as a whole, and above all public interest. It is in the public interest that there be an ethical and disciplined legal profession and indeed the privileged position which the legal profession enjoys by law can

only be justified on those grounds. It is for this reason, to ensure that public interest in having a legal profession of the highest possible standard is upheld, Parliament has, in his wisdom set up the scheme of disciplinary proceedings under the Act for the proper discipline of advocates and solicitors.

[18] Thus, taking into consideration the scheme of disciplinary proceedings under the Act, I am of the view that this court must not entertain this type of action. To me, the plaintiffs must exhaust their domestic remedies before coming to this court. All of the plaintiffs' arguments as to the validity of the complaint can and should be raised before the disciplinary committee at the hearing of the said complaint. There is an appeal process. The plaintiffs have the right to appeal to the High Court and have a further right to appeal to the Federal Court.

[19] The Court of Appeal in *Cheah Foong Chiew v Lembaga Jurutera Malaysia* [1999] 3 MLJ 110 held to the effect that as a matter of judicial policy, the court should not intervene but should allow the domestic tribunal to proceed and decide on the matter. Similarly, in this case, the disciplinary committee and the disciplinary board should be allowed to proceed with the disciplinary proceedings against the plaintiffs. Thereafter, the appeal process. Thus, I am of the view that the plaintiffs must exhaust their domestic statutory remedies and not to short circuit the statutory disciplinary and appellate process. I, therefore, dismissed the plaintiffs' application with costs.

Application dismissed with costs.

Reported by Simerjit Kaur